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The (New) Rights of Data Subjects according to the General Data Protection Regulation

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Introduction: Where it all started...

- Recap: The General Data Protection Regulation (GDPR) **builds on and continues** the substance of Directive 95/46/EC
 - “The processing of personal data should be designed to serve mankind.” (Rec. (4))
 - “objectives and principles of Directive 95/46/EC remain sound” (Rec. (9))
- Therefore: **Widely comparable set of rights** between Directive and GDPR but the Regulation will
 - Strengthen the rights
 - Better adapt them to the “Internet age”/online context
 - “Natural persons should have control of their own personal data.” (Rec. (7)) ... “widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity” (Rec. (9))

...and where it has brought us to

- But: GDPR also introduces **new rights** to allow *data subjects (DS)* better control over their personal data (“user empowerment”)
- **Corresponding obligations** of *data controllers (DC)* and *data processors (DP)* to implement the necessary measures that allow DS to exercise these rights and enable DC and DP to respect them
- Recitals underline that not only protection of fundamental rights of DS is the aim, but also ensuring free flow of data, improving framework for controlling and processing companies due to more legal certainty, strengthen EU approach
- Recitals further clarify substantive provisions on scope and territorial applicability, connection with related instruments and give more details on key notions such as consent, processing etc.

Empowering the data subject: Upgrading the “consent” requirement

- **Consent**-requirement (Art. 4 N°. 11)
 - “freely given, specific, informed and **unambiguous** indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;”
 - comparable to the Directive, but additional requirement of unambiguity
 - Burden of proof with DC (Art. 7 (1))
- Also: if consent is given **in the context of a written declaration which also concerns other matters** the request for consent must be presented:
 - in a manner which is clearly distinguishable from the other matters
 - in an intelligible and easily accessible form
 - using clear and plain language (Art. 7 (2))
- Clear possibility to **withdraw** consent at any time (Art. 7 (3))

Consent requires freedom of choice and maturity

- Consent has to be **freely given** (Art. 7 (4)):
 - not the case if the performance of a contract/ provision of a service is made conditional on consent to the processing of data which is not necessary for the performance of this contract
- Need for the consent of the **holder of paternal responsibility** for children under the age of 16 (or less strict, depending on MS law, down to 13) concerning online services (“ISS”) directly offered to children (Art. 8 (1))
- As a result, this means e.g. that definitely on any website no pre-ticked boxes for consent are permissible and active clicking will be necessary.
 - Additionally specific and accessible information about the processing one is to consent to
 - Interesting in this context will also be to see where the ePrivacy-Directive (2002/58/EC) reform will go

Data subjects' rights

Under **Directive 95/46/EC** and the **GDPR**

Directive 95/46/EC	GDPR
Right to information	Right to information
Right of access	Right of access
Right of rectification	Right of rectification
Right to erasure	Right to erasure (“ Right to be forgotten ”)
Right to blocking	Right to restriction of processing
---	Right to data portability
Right to object to the processing	Right to object to the processing
Right to not be evaluated on the basis of automated processing	Right to not be evaluated on the basis of automated processing (including profiling)

The reinforced Right to Erasure ("The Right to Be Forgotten")

- DS's right to obtain from the DC the **erasure** of personal data without "undue delay" (Art. 17 (1)) when:
 - The personal data is no longer necessary in relation to the original **purposes**
 - **Consent** is withdrawn (concerning processing based on consent and not another legal ground)
 - Successful **objection** to the processing by the DS (i.e. no overriding interests for continuation)
 - **Unlawful processing**
 - Compliance with a **legal obligation** (in EU or applicable MS law)
 - Personal data collected in relation to offering of information society services to a **child**
- Obligation of the **DC to inform other DC** which are processing the data of the request of the DS to erase any link to or copy and replication of the data (Art. 17 (2)) when:
 - The DC is obliged to erase the data and he had made the data public originally
 - Obligation of means to inform: "**take reasonable steps**" (incl. technical measures), thereby taking into account the available technology but also cost of implementation
- Important to consider **exceptions** to these obligations if processing necessary (Art. 17 (3)):
 - Freedom of expression and information
 - Reasons of public interest in the area of public health
 - Archiving purposes and others

The Right to Restriction of Processing

- Formerly “blocking” certain types of processing, now **“restricting” the processing** to certain types (Art. 18 (1)). Same idea on which right is based but reversed approach. And basically a minus compared to requesting erasure of data under Art. 17, i.e. processing by DC is still possible but in a limited manner (temporal or subject-matter):
 - When the **accuracy** of the data is contested by the DS
 - For as long as necessary in order for the DC to verify accuracy of the data
 - When the **processing is unlawful** and the DS opposes erasure, but instead opts for restriction
 - DC **no longer needs the data for the purposes** of the processing, but DS requires them in the context of legal claims
 - The **DS has objected** to the processing of data [under the limited scope of Art. 6 (1) e) and f)]
 - Pending verification of whether the legitimate grounds of the DC override the rights of the DS
- If a restriction right has been exercised, personal data **may not be processed any longer** (exception: storage) **unless**:
 - DS’s consent
 - For the establishment, exercise or defence of legal claims
 - For the protection of the rights of other natural or legal persons
 - For reasons of important public interest of the EU or a MS

The new Right to Data Portability

- The DS has the right to receive from the DC personal data concerning him or her in a **structured and commonly used** and **machine-readable format** and have the right to transmit those data to another DC (Art. 20 (1)), if:
 - The DS has provided the data to the DC
 - The processing is based on consent or contract
 - The processing is performed by automated means
- Possibility to have **data transmitted directly from DC to DC** (where technically feasible) (Art. 20 (2))

➤ Noteworthy:

- Implementation might pose problems as regards its technical implementation by DC and potentially significant costs
- Raises the question of the interoperability of systems

The rephrased Right to Object

- Right to Object concerns three specific contexts and has been made significantly more precise in the new version of the GDPR.
 - Even if the processing is carried out in the context of public interest/official authority or with a legitimate interest of the DC (on Art. 6 (1) e), f)), DS can object **on grounds relating to its particular situation** (Art. 21 (1))
 - but: can again be overridden by compelling legitimate grounds of the DC
 - Objection to processing **for direct marketing purposes** (Art. 21 (2)) at any time
 - and now combined with the related prohibition of profiling if objected
 - When data is processed for scientific/historical research purposes or statistical purposes objection is again possible **on grounds relating to the particular situation of the DS** (Art. 21 (6))
 - But: can be overridden if the processing is necessary for the performance of a task carried out for reasons of public interest

- Noteworthy:
 - Extensive information obligations and need for separate information
 - Use of technical means has to be enabled
 - Review of existing privacy policies/notices most likely necessary

The Right Not to be Subject to Automated decision-making and Profiling

- DS has **the right not to be subject to a decision based solely on automated processing, including profiling** (Art. 22 (1))
 - Applies, if the decision has legal effects on the DS or significantly affects the DS in a similar way
 - Exceptions (Art. 22 (2)):
 - Decision is necessary in the context of a contract between DS and DC
 - Decision-taking on this basis is authorized by Union or applicable MS law (e.g. fraud or tax evasion legislation)
 - Explicit consent of the DS

- Noteworthy:
 - Underlying idea is that DS is in principle not subjected to purely automated decisions (e.g. automated refusal of an online credit application)
 - Where admissible, nonetheless need for suitable safeguards:
 - information of the DS, possibility to obtain human intervention, challenge the automated decision etc.

- DS's right to lodge **a complaint with a DPA** (Art. 77) in the MS of his/her:
 - habitual residence
 - place of work
 - place of the alleged infringement

- Right to an **effective judicial remedy against a DPA** (Art. 78) before the courts of the MS of that DPA:
 - Against a legally binding **decision of a DPA**
 - Regarding a **complaint**, if a DPA
 - does not handle a complaint, or
 - does not inform the DS of the progress/outcome of a complaint (within 3 months)

- Right to an **effective judicial remedy against a DC/DP** (Art. 79) before the courts of the MS:
 - where the DC/DP has an establishment, or
 - where the DS has his/her habitual residence (unless DC/DP is a public authority)

- DS have the right to **mandate** a **not-for-profit body/organization/association** (Art. 80 (1)) to:
 - Lodge a complaint on his/her behalf
 - Exercise certain rights on his/her behalf:
 - Right to lodge a complaint with a DPA
 - Right to an effective judicial remedy against a DPA
 - Right to an effective judicial remedy against a DC/DP
 - Right to receive compensation → Art. 82

- MS can foresee that additionally any body/organization/association can lodge a complaint with the competent DPA, **independently of a mandate by the DS**, to exercise these rights, when it considers that there is an infringement of DS's rights under the Regulation (Art. 80 (2))

Conclusion: Putting the Data Subject More in Control

- **DS** shall be better informed about the processing and be given more means to control the processing of their personal data
 - Stronger opt-in **consent** to make sure DS are well-aware of and agree to the processing
 - Current practices of “Take it or leave it” offers (“all or nothing”) might be eliminated due to emphasis on the *free* consent
 - More **refined rights**
 - Existing rights “sharpened” and more applicable in modern context
 - e.g. the information to be provided to the DS are more detailed and include (among others) the contact details of the DPO
 - **New rights** to enable control:
 - data portability shall prevent customer “lock-in” and enable DS to move freely from one controller to another
- Substantial implications for **DC** and **DP**
 - Enhanced transparency obligations
 - Need to revise current policies and practices
 - Need to implement new procedures and means that allow DS to exercise their rights
 - Some might raise technical implementation issues (e.g. data portability, erasure)



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